APPENDIX "A".

Opinion of the Court of Appeals for the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

DUFFY, *Circuit Judge.* Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on the Corner", was based largely on Chapter 2 of the Commission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated*, 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclnde that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which

relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullican,* 376 U. S. 254. Thereafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times,* the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." 'It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being

limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox,* 357 Mich. 134, 97 N.W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company,* 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins,* 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore,* 388 SW 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne,* 206 A. 2d 591 (N.J. 1965) and *Matassa* v. *Bel,* 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan.*

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan,* stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were mere allegations in a complaint. But, negligence is not enough.

In *New York Times,* the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also, that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana,* 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan.* There, the District Court had dismissed the complaint on the defendant's motion so that all the well-

pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*"

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "B".

Former Opinion of the Court of Appeals for the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> * * * its function is purely investigative and fact-find-

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

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ing. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

The Time article, captioned "Civil Rights—Dawdling on the Corner," [3] was based on that part of Chapter 2 of the Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

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3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Hesburgh, C.S.C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

Time's article introduced the reader to *Justice* as carrying "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brazier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> *Search, seizure, and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police

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5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]

> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

Justice, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.,* 291 Fed. 632 (D. C. Minn. 1923), to comment fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.,* 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.,* 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.,* 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.,* 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by

the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged* Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complain-

ants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "* * * a complaint which alleged that."

Time argues that the "innocent construction" rule requires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done those things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

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8. 5 U. S. COMM. ON CIVIL RIGHTS REPORT 5 (1961).

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice", it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence", while, at page 5, it disclaimed making any conclusive determination as to whether the complainants or the police officers were correct in their statements, this being "a function of a court". But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by *staff*[2] field investigations". That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and non-

1. Said act required the filing of a report. See § 1975c (b).

2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

actionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

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No. 1030

In the
Supreme Court of the United States
October Term, 1965.

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Questions Presented 1

Reply to Petitioner's Statement of the Case 3

Conclusion 11

CITATIONS.

Cases:

Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65 (1966) 8

McDavitt v. Boyer, 169 Ill. 475, 1897, 48 N.E. 483 (1897) 8

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. ed. 2d 686 (1964) 2, 5, 6, 10

Pape v. Time, Inc., 318 F. 2d 65 (1963) 3, 4, 6

Yates v. United States, 354 U.S. 298 (1957) 7

Statutes:

Civil Rights Act, R.S. sec. 1979, 42 U.S.C.A. 1983 8

Miscellaneous:

1961 Report of the U.S. Commission on Civil Rights, Vol. 5, Justice 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1030

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Questions Presented

1. Petitioner is in error in presenting the decision of the Court of Appeals as holding that a jury could infer actual malice from petitioner's neglect. ". . . to disclose the ultimate source of the Commission's language . . ."

The Court of Appeals (Petitioner's Appendix A, page 6a) said:

> "As stated in our previous decision— '. . . Time took the risk when it reworded parts of the Commission's Report that it might go too far . . . .' We noted that Time had departed from fidelity to the Commission's Report in order to make the article